

Teamsters Local 296, Sales Delivery Drivers, Warehousemen and Helpers Union a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Northwest Publications, Inc. Case 32-CB-513

August 27, 1982

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 21, 1980, the National Labor Relations Board issued a Decision and Order¹ in the above-entitled proceeding in which a majority of the panel² adopted an Administrative Law Judge's finding that Respondent did not violate Section 8(b)(1)(B) of the Act when it imposed a fine upon supervisory employee Robert O'Donnell for allegedly performing unit work prior to punching in on the timeclock. The panel majority found that Respondent's action against O'Donnell was not an attempt "to force the Employer to change its interpretation of the collective-bargaining agreement" but, instead, was intended "to address the personal decision of O'Donnell, a member of Respondent Union, to violate trade union principles by 'donating' labor to the Employer." Accordingly, the panel majority found Respondent's action in the instant case distinguishable from the union's action in a prior case³ where the union's discipline of supervisory employees was found violative of the Act. Accordingly, the panel majority dismissed the complaint in its entirety. Member Jenkins dissented, arguing that the discipline of O'Donnell was an attempt by Respondent to impose its interpretation of the collective-bargaining agreement on O'Donnell and thereby impede the Employer's control over its supervisors.⁴

Thereafter, the Employer filed a petition for review of the Board's Order with the United States Court of Appeals for the Ninth Circuit. On September 14, 1981, the court issued its decision,⁵ vacating the Board's Order and remanding the case to the Board for further consideration. In its decision, the court noted that in decisions such as *Yakima Beverage* the Board has found that a union violates Section 8(b)(1)(B) if it disciplines a

supervisor/member when he or she has taken a position different from the union on a disputed contract provision. The court then found that Respondent's discipline of O'Donnell did, in fact, involve the interpretation of the collective-bargaining agreement and that in bypassing the grievance process to fine a supervisor over a contract dispute Respondent acted in violation of Section 8(b)(1)(B) at least to the extent *Yakima Beverage* and related cases remain the applicable law. Accordingly, because of the Board's failure to follow its own precedent, the court remanded the case for further proceedings.

Thereafter, the Board informed the parties that they were entitled to file statements of position on the issues raised by the remand. The General Counsel filed a statement of position and the Charging Party (Employer) filed a statement of position and supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having accepted the remand, respectfully recognizes the court's decision as binding for the purposes of deciding this case.

Briefly stated, the pertinent facts are as follows: Robert O'Donnell, a supervisor within the meaning of Section 2(11) of the Act and a member of Respondent, was employed in the Employer's newsprint warehouse along with three other employees. All four were covered by a collective-bargaining agreement between Respondent and the Employer. The four, including O'Donnell, were hourly paid, punched a timeclock, and, for the most part, performed the same type of work.

On March 24, 1979, the unit employees filed a complaint with Respondent alleging that O'Donnell was performing certain unit work prior to his starting time and on his lunchbreak. The work consisted of certain "pre-start" activities that O'Donnell performed on a daily basis in walking from the warehouse entrance to the timeclock. It appears that this type of work had been consistently performed by O'Donnell's predecessors.

On April 12, 1979, Respondent notified O'Donnell that he was to appear before its executive board on April 26 in response to charges that his pre-start activities violated sections 15 and 16 of the collective-bargaining agreement. The Employer directed O'Donnell not to appear and informed Respondent that it considered O'Donnell's pre-start work to be supervisory in nature. The Employer further claimed that the disciplinary action interfered with its right to name a supervisor and allow him to function effectively. O'Donnell was fined

¹ 250 NLRB 838. On July 28, 1980, the Board issued an Order correcting several inadvertent errors in its July 21, 1980, Decision and Order.

² Former Members Penello and Truesdale with Member Jenkins dissenting.

³ *Teamsters Local No. 524, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Yakima County Beverage Company, Inc. and Chaney Beverage Company)*, 212 NLRB 908 (1974).

⁴ Member Jenkins further argued that the *Yakima Beverage* decision (see fn. 3, *supra*) was applicable to the facts in the instant case.

⁵ 656 F.2d 461.

\$250, of which \$150 was suspended. O'Donnell paid the balance under protest.

Based on the foregoing, we conclude that Respondent violated Section 8(b)(1)(B) when it disciplined O'Donnell for performing certain pre-start job tasks. Our review of the entire record convinces us that O'Donnell's actions were carried out in furtherance of the Employer's established practice of having its supervisors perform such tasks. Thus, Respondent plainly sought to interfere with the performance of a job task traditionally performed by the Employer's supervisory personnel. In addition, contrary to the Administrative Law Judge's conclusion, Respondent's action, in substantial part, involved a dispute over the applicability and interpretation of the collective-bargaining agreement. Accordingly, by seeking to discipline O'Donnell, Respondent unlawfully sought to coerce O'Donnell into conforming his job tasks to Respondent's perception of the contract requirements and supervisory functions. We find, therefore, that Respondent's action violated Section 8(b)(1)(B). *Yakima Beverage, supra*.⁶

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, we shall order that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. We shall, *inter alia*, order that Respondent rescind any fines against Robert O'Donnell and refund to him any moneys held on account of the fine assessed, with interest in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁷

Upon the basis of the foregoing, and upon the entire record in this case, including the Ninth Circuit Court of Appeals decision, the Board makes the following:

⁶ In its remand, the court noted that the Board would be free to reconsider its decision in *Yakima Beverage*. We continue to adhere to that decision.

The court also declined to pass on the issue of whether the "reservoir doctrine" remains a viable means for determining whether a supervisor such as O'Donnell is a representative within the purview of Sec. 8(b)(1)(B). Under the doctrine, the Board has found that all supervisors within the meaning of Sec. 2(11) are representatives within the intent of Sec. 8(b)(1)(B) notwithstanding the absence of evidence that the individual in question is specifically vested with authority to act for the employer in collective bargaining or the adjustment of grievances. See *United Brotherhood of Carpenters & Joiners of America, Local Union No. 14, AFL-CIO (Max M. Kaplan Properties)*, 217 NLRB 202 (1975). Cf. *American Broadcasting Companies, Inc., et al. v. Writers Guild of America, West, Inc., et al.*, 437 U.S. 411, 436 (1978), where the Court opined that: "Union pressure on supervisors can affect either their willingness to serve as grievance adjusters or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative." We continue to adhere to the "reservoir doctrine" and, accordingly, we find that O'Donnell was a representative within the purview of Sec. 8(b)(1)(B).

⁷ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute interest in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

CONCLUSIONS OF LAW

1. Northwest Publications, Inc., is, and at all times material herein has been, an employer within the meaning of Sections 2(2) and 8(b)(1)(B) of the Act.

2. Northwest Publications, Inc., is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent Teamsters Local 296, Sales Delivery Drivers, Warehousemen and Helpers Union a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

4. Robert O'Donnell is, and at all times material herein has been, a supervisor within the meaning of Section 2(11) of the Act and a representative of Northwest Publications, Inc., within the meaning of Section 8(b)(1)(B) of the Act.

5. By imposing a fine against Robert O'Donnell because he allegedly violated the collective-bargaining agreement between Respondent and Northwest Publications, Inc., Respondent has restrained and coerced Northwest Publications, Inc., in the selection and retention of its representatives for the purposes of collective bargaining or the adjustment of grievances and has engaged in an unfair labor practice within the meaning of Section 8(b)(1)(B) of the Act.

6. The aforesaid unfair labor practice is an unfair labor practice within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Teamsters Local 296, Sales Delivery Drivers, Warehousemen and Helpers Union a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, San Jose, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Fining or otherwise disciplining Robert O'Donnell, or any other supervisor or representative of Northwest Publications, Inc., for allegedly violating the provisions of the collective-bargaining agreement between Respondent and Northwest Publications, Inc.

(b) In any like or related manner restraining or coercing Northwest Publications, Inc., in the selection and retention of its representatives for the pur-

poses of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Rescind the fine levied against Robert O'Donnell and expunge all records of the fine from its files.

(b) Refund to Robert O'Donnell any moneys held on account of the fine assessed against him with interest as set forth in the section of the Decision herein entitled "The Remedy."

(c) Post at its offices and meeting halls, and other places where notices to its members are customarily posted, copies of the attached notice marked "Appendix."⁸ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 32 with signed copies of such notice for posting by Northwest Publications, Inc., if willing, in places where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this

⁸ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT fine or otherwise discipline Robert O'Donnell, or any other supervisor or representative of Northwest Publications, Inc., for allegedly violating the collective-bargaining agreement between us and Northwest Publications, Inc.

WE WILL NOT in any like or related manner restrain or coerce Northwest Publications, Inc., in the selection and retention of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL rescind the fine levied against Robert O'Donnell and expunge all records of the fine from our files.

WE WILL refund to Robert O'Donnell any moneys held on account of the fine assessed against him, with interest.

TEAMSTERS LOCAL 296, SALES DELIVERY DRIVERS, WAREHOUSEMEN AND HELPERS UNION A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA